

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CRIMINAL APPLICATION No 1175 of 1998

For Approval and Signature:

Hon'ble MR.JUSTICE C.K.BUCH Sd/-

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES
Yes
2. To be referred to the Reporter or not? Yes :
3. Whether Their Lordships wish to see the fair copy of the judgement? : NO
No
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? No : NO
5. Whether it is to be circulated to the Civil Judge? : NO
No

SUNIL ARVINDBHAI KAPADIA

Versus

UNION OF INDIA

Appearance:

MR AD SHAH for Petitioner

MR BT RAO for Respondents Nos. 1 & 3

MR DN PATEL ADDL PUBLIC PROSECUTOR for Resp. No. 2

CORAM : MR.JUSTICE C.K.BUCH

Date of decision: 16/07/1999

CAV JUDGEMENT

RULE. Learned Counsel Mr.B.T.Rao waives service of Rule for Respondents Nos.1 & 3 and learned Additional Public Prosecutor Mr.D.N.Patel for Respondent No.2 State.

2. Heard learned Counsel for the parties. At the admission stage learned advocates have agreed to dispose of this matter finally, hence the same is taken up for final hearing.

3 The petitioner is an authorised person of one M/s. Swami Nana Exchange (P) Ltd. having its Registered Office at Nadiad of District Kheda. According to the petitioner, his father has expired. His one uncle Jitubhai Kapadia has also expired. He, his cousin brother (son of Jitubhai Kapadia) and his uncle Chimanbhai Harjivandas Kapadia are residing in a joint family. The joint family is headed by the petitioner's uncle Chimanbhai Harjivandas Kapadia. According to the petitioner, he, Himanshu (son of Chitubhai Kapadia) and daughter-in-law of his uncle Chimanbhai H. Kapadia, Smt. Alkaben are authorised officers of M/s. Swami Nana Exchange (P) Ltd. Smt. Alkaben wife of Gaurangbhai Chimanbhai Kapadia is the Chairperson of this company. According to the petitioner, the petitioner and his cousin brothers and uncle Chimanbhai Kapadia are residing under a common roof at 10, Uttam Park Society, College Road, Nadiad.

4. The petitioner has filed this petition under Article 226 of the Constitution of India and has prayed for the following main reliefs:

(A) That the Hon.'ble Court may be pleased to
issue appropriate writ and/or direction
to the officer of Enforcement
Directorate to return the seized
foreign currency as well as
Indian currency as mentioned in
the seizure reports, immediately
on suitable terms and conditions;

(B) That the Hon.'ble Court may be pleased to
issue appropriate writ and direction for
quashing and setting aside the action of
seizure of the foreign as well as Indian
currencies under different Panchnamas on
14th October 1998 and 15th October
1998."

5. I have gone through the averments of the petition and the say of respondents Nos.1 & 3 in their affidavits, affidavit-in-reply and the second affidavit is filed in response to the rejoinder affidavit. The dispute between the parties pertains to seizure and retention of some documents, namely, foreign as well as Indian currency notes and travellers cheques etc. owned by the petitioner's Company which was the stock-in-trade for the company undisputedly authorised to deal in foreign exchange by the Reserve Bank of India. For the sake of brevity and convenience, it would be proper to refer

'Reserve Bank of India' as "the RBI" and 'foreign exchange' as "FE". The petitioner's Company i.e. M/s. Swami Nana Exchange (P) Ltd., Nadiad is authorised to deal in FE by the RBI under Licence No.24/98 dated 1.8.1998. The petitioner, Himanshu Kapadia, cousin brother of the petitioner and Smt. Alkaben Gaurangbhai Kapadia are authorised officers of M/s. Swami Nana Exchange (P) Ltd. and their company has been authorised by the above licence issued by the RBI vide its power under Section 7 of the Foreign Exchange Regulation Act, 1993 (46 of 1993) (hereinafter referred to as "the FERA"). The company was authorised by the RBI vide the above licence dated 1.7.1998 and the said company was raided by the ATS (Anti Terrorist Squad) on 14.10.1998. The petitioner's company, though was issued licence on 1.7.1998, had received the[[licence on 14.7.1998 and had commenced its business from 17.7.1998. So it can be said that within the actual completion of the first quarter, the ATS raided the residential house of the petitioner and seized 30,000 US \$ from the petitioner's uncle Chimanbhai H. Kapadia, father-in-law of the Chairperson of the company Smt. Alkaben Gaurangbhai Kapadia. Inter-se relation between the directors and Chimanbhai H. Kapadia from whom the amount was seized is not disputed and it is not also disputed, seriously, that all of them are residing under a common roof at the given address. According to the petitioner, the amount seized by the ATS from Chimanbhai H. Kapadia was given to him to keep it in safe custody as the petitioner was to go out of town on 14.10.1998. After perusal of the affidavits filed by respondents Nos. 1 & 3 and the stand taken by the officers of Enforcement Directorate, FERA, Ahmedabad before the learned Metropolitan Magistrate, Ahmedabad, it reveals that, according to the Department, Mr.Sunil Kapadia (the petitioner)) had no right to handover any foreign exchange to any person who is not an authorised dealer in foreign exchange without any previous permission of the RBI. It is also the say that any authorised officer of M/s. Swami Nana Exchange (P) Ltd. including the petitioner has no legal rights to hand over this foreign currency to any person who have no such authority. Therefore, the act of the petitioner in handing over the said currency notes to Chimanbhai H. Kapadia was not authorised and acquisition by Chimanbhai H. Kapadia of the said amount is too an independent act of controversy under Section 8 of the FERA. It is contended that (i) the petitioner had violated the provisions of FERA by handing over 30,000 US \$ to his uncle at his residence, at a place other than the official premises of the company and (ii) thus his uncle Chimanbhai H. Kapadia violated the provisions of the

FERA by acquiring the same without prior or general permission of the RBI; (iii) the petitioner company was authorised to collect currency notes but not to put these currency notes anywhere else than the company premises unless such permission has been granted by the regulating authority, namely, the RBI.

6. It is averred by the petitioner that there is no charge of breach of any of the provisions of the FERA by Chimanbhai H. Kapadia, so certain set of facts available on records require narration to appreciate the stand taken by the parties.

7. The petitioner 's company having recent origin had no facility of safe custody in its shop where it was carrying on its business. On 14.10.1998, 30,000 US \$ were purchased from different persons and for that purpose Rs.24 lacs were withdrawn from bank (Rs.10 lacs + Rs.14 lacs) on 14.10.1998. Insurance companies were not being ready to take risk to insure the foreign currency notes and, therefore, the petitioner and other persons concerned with the company used to keep the foreign and Indian currencies for safe custody at their residence. On 14.10.1998, the day on which he purchased 30,000 US \$, the total stock with the company was of 34,085 US \$. According to the petitioner, he was to go out and there was nobody except his cousin brother Himanshu Kapadia at the office of the company. He had taken out 30,000 US \$ from the stock and the same was handed over to his uncle Chimanbhai H. Kapadia for safe custody with appropriate instructions. When ATS officers visited the residential premises of the petitioner, he was not present personally and the entire foreign currency of 30,000 US \$ was seized by ATS officers. They also removed Chimanbhai H. Kapadia and cousin brother Rahul Kapadia. These two persons along with 30,000 US \$ were handed over to the Director of Enforcement, FERA Department and the FERA officers released Rahul Kapadia. On 14.10.1998 at about 11.50 p.m. the officers of FERA Department came to the residence of the petitioner and carried out searches upto the next day evening i.e. upto 6.00 p.m. on 15.10.1998. Under panchnama (Annexure-B) the officers of Directorate of Enforcement (FERA), seized certain documents. Office of the petitioner company was also searched by one Enforcement Officer Shri P.S.Thakkar from 8.30 a.m. to 3.45 p.m. on 15.10.1998. There was simultaneous searches at two places when the officers seized Indian Currency of Rs.96,962/- along with certain pages of computer sheets, stock reports etc. This search and seizure was made in presence of Himanshu Kapadia, an authorised officer of the company. A Panchnama was also

drawn and the same is available at Annexure-C of the petition. The Chairperson of the company had sent a telegram at 8.30 p.m. on 15.10.1998 expressing her grievance alleging the illegal seizure of foreign currency, Indian currency and travellers cheque etc. and she informed about the authorisation granted by the RBI and clarified that her company has the status of "full-fledged money-changers". Statement of Chimanbhai H. Kapadia was recorded by the Enforcement Directorate officers and thereafter he was produced before the Metropolitan Magistrate, Ahmedabad. The petitioner and the Chairperson of the company both appeared before the Enforcement Director in pursuance of the summons dated 29.10.1998 and thereafter also the petitioner was interrogated time and again upto 6.11.1998. Chimanbhai Kapadia was remanded to judicial custody and was never interrogated by the FERA Department while he was at Central Jail, Sabarmati.

8. The petitioner applied before the learned Metropolitan Magistrate for return of muddamal but the Department of Respondents Nos.1 & 3 resisted the application stating that the application for return of muddamal is not maintainable as the muddamal is never produced before the concerned Magistrate. According to the Department, the muddamal mentioned in the application was seized under Section 37 of the FERA and the Directorate is entitled to keep the seized material in their custody for the purpose of investigation for a period of six months under Section 41 of the FERA. The petitioner has therefore challenged the legality and validity of the action of retention of the seized foreign currency as well as Indian currency mentioned in the seizure report.

9. I am taken through the relevant sections of the FERA, but the arguments of learned Counsel are focused on the provisions of sections 7, 8, 37, 38 and 41 of the FERA. The learned Counsel for the petitioner Shri A.D.Shah also relies on the Memorandum of Instructions given to full-fledged money-changers by RBI, which were good on the day of search and seizure. The memorandum was issued in the month of July 1997 and the xerox copy of the same is tendered before this court. On 9.10.1998, the petitioner company had written a letter to the RBI asking advise for the safe custody of foreign currency. A xerox copy of the letter written by the RBI to the petitioner is also tendered during the course of final hearing wherein the General Manager of RBI has advised the petitioner's company to the effect that "there is no bar from your side for keeping the foreign exchange at

your residential premises for security etc. reasons". Though the letter is of 7.1.1999, the same can help this court in deciding the dispute between the parties because the same is written in response to the letter written by the petitioner company earlier on 9.10.1998, much earlier than the date of visit of ATS officers at the residence of the petitioner and seizure of 30,000 US \$. This letter also can help in interpreting the practice normally adopted by the RBI, as one of the regulatory authorities in similarly situated cases. Under the FERA, more than one authority is empowered to regulate the foreign exchange including the RBI. No authorised officer of the petitioner company is charged with violation of the FERA by the Enforcement Directorate or any other regulating authority. I would like to refer the relevant part of Section 8 of the FERA referred by the learned Counsel appearing for the parties, it reads as under:

"8. Restrictions on dealing in foreign exchange:

(1) Except with the previous general or special permission of the Reserve Bank, no person other than an authorised dealer shall in India, and no person resident in India other than an authorised dealer shall outside India purchase or otherwise acquire or borrow from, or sell, or otherwise transfer or lend to or exchange with, any person not being an authorised dealer, any foreign exchange:

Provided that nothing in this sub-section shall apply to any purchase or sale of foreign currency effected in India between any person and a money-changer.

Explanation: For the purposes of this sub-section, a person, who, deposits foreign exchange with another person or opens an account in foreign exchange with another person, shall be deemed to lend foreign exchange to such other person.

- (2) xxx xxx xxx
- (3) xxx xxx xxx
- (4) xxx xxx xxx
- (5) xxx xxx xxx "

10. In view of the above relevant provision, both the parties have contended that their say about interpretation of the above provisions of Section 8 (1) of the FERA should be accepted. On perusal of the

affidavits filed by the parties, it should be accepted that some factual questions are involved. But on appreciating the pleadings and the say of the parties, it can be inferred that the dispute between the parties is a legal dispute and mainly rests with the interpretation of above Section 8 vis-a-vis to other relevant provisions of Sections 7, 36, 37, 40 & 41 of the FERA. It is not the say of any of the respondents that any disputed question of fact is involved. For the reasons best known to the parties, the first panchnama drawn by the ATS of the State of Gujarat who seized the foreign currency of 30,000 US \$ is not produced before this court. It reveals from the report filed by the Enforcement officers in the Court of Additional Chief Metropolitan Magistrate, Ahmedabad (Annexure-F) that the relevant documents were produced by the officers of ATS, Ahmedabad on 14.10.1998 in the office of the Enforcement Directorate (FERA), Ahmedabad. But it is not certain that any detailed panchnama in presence of panchas was drawn at the time of seizure of FE. Statements of Rahul Arvindbhai Kapadia was recorded under Section 40 of the FERA. This Rahul Arvindbhai Kapadia is the younger brother of the present petitioner Sunil Arvindbhai Kapadia. But looking to the language of the report and in view of the positive averments made by the petitioner, it is clear that this Rahul Arvindbhai Kapadia was not arrested under Section 35 (1) of the FERA. According to respondents Nos.1 & 3, the currency of 30,000 US \$ was recovered during the search of a person, namely, Chimanbhai H. Kapadia Jayantilal outside the Bungalow No.10 of Uttam Park Society and the action taken by the office of ATS, Ahmedabad was on prior information. This Chimanbhai H. Kapadia is aged about 67 to 68 years and according to the report filed before the Additional Chief Metropolitan Magistrate, Ahmedabad, when the alleged search was carried out by the ATS persons Rahul Arvindbhai Kapadia was accompanying him. The Department is authorised to retain documents, which includes foreign currency notes, during investigation. It is averred that in view of the decision of the Supreme Court in the case of S.P.ARJUN CHETTIAR v. ENFORCEMENT DIRECTOR, the Department has a right to retain custody of documents of currency upto a period of one year as per the contemplation of Section 41 of the FERA. Provisions of Sections 37, 38 and 41 are mainly relied by respondents Nos.1 & 3 and the learned Counsel appearing for respondents Nos.1 & 3 has placed his reliance on the case reported in AIR 1985 SC page 989 PRATAPSINGH v. DIRECTOR OF ENFORCEMENT FOREIGN EXCHANGE. The learned Counsel Mr.B.T.Rao has taken me through the relevant paras of the aforesaid decision of the Supreme Court. Respondents Nos.1 & 3 have tried to impress upon

this court that some previous involvement of Chimanbhai H. Kapadia is an important aspect and should be looked into and it also should be considered that certain foreign currencies and documents are recovered from Shri Chimanbhai H. Kapadia and also from the office premises of M/s. Swami Nana Exchange (P) Ltd. along with huge Indian currency, namely, Rs.11 lacs and Rs.96,962/-. The learned Counsel appearing for respondents Nos.1 & 3 has stated about the sensitivity of the issue and pendency of the investigation. According to Mr.Rao, M/s. Swami Nana Exchange (P) Ltd. was not having stock of US \$ 30,000 on the day on which the amount was recovered from Chimanbhai H. Kapadia. The names of persons from whom the above currencies was purchased by the present petitioner were given by the present petitioner from the record of the company. The department has revealed that some names are fake names and some of them were dead on the day on which currency was alleged purchased by the present petitioner. In para 12 of the affidavit-in-reply filed by respondents No.1 & 3, it is contended that from the very records of M/s. Swami Nana Exchange (P) Ltd. it has been, prima facie, revealed that the authorised foreign exchange dealer is also committing several irregularities and not complying with the conditions of licence. Mr.Rao has submitted that the foreign exchange cannot be returned back because if at the end of trial the authority comes to the conclusion of confiscation, then the same currency is required to be confiscated and ultimately it will go to the coffer of the Central Government. While appreciating this part of submission, the Court has to consider two main aspects: (1) Scope of confiscation of currency seized; (2) if the currency seized from petitioner is of stock-in-trade and if retained for unreasonable time, whether would it seriously prejudice the other side. Other aspects are also relevant which require to be considered but it is the accepted legal position that investigating agencies are not permitted to retain property or documents merely because there are provisions as to confiscation of such property at the end of inquiry or trial. In the case of the present petitioner, respondents Nos.1 & 3 mainly rely on the provisions of Section 41 and submits that they are legally authorised to retain all the documents including Indian currency as the investigation is still pending. The grievance of respondents Nos.1 & 3 Department is that Shri Chimanbhai H. Kapadia and his associates were earlier implicated in a case for violation of FERA and show cause notices were issued against them. The petitioner is also facing inquiry by the Department as a power of attorney holder of M/s. Swami Nana Exchange (P) Ltd. Respondents Nos.1 & 3 have tried to establish,

prima facie, that Chimanbhai @ Jayantibhai Kapadia, who is not an authorised person to deal in foreign exchange, is involved in illegal business of foreign exchange with his associates contrary to the provisions of the FERA, or in the activity of the company or the officers of the company including the petitioner at a place other than the office premises of M/s. Swami Nana Exchange (P) Ltd. is illegal. The licence given to the company, having its office at Bhavsarwad, authorises it to do business in foreign exchange, travellers cheques issued by the overseas organisations only at the aforesaid address upto the limits specified.

11. Section 41 of the FERA says that, any document furnished or seized under Sub-Section (2) of Section 33 or the provisions of Section 34 or Section 36 or Section 37 or under requisition or summons under Section 39 or Section 40, any officer of the Enforcement Department, if has reason to believe that the documents would be evidence of contravention of any of the provisions of the Act or of any Rule framed thereunder, and it would be necessary to retain the documents in his custody, then such officer can retain such documents (including foreign exchange) for a period of not exceeding six months.

12. The learned Counsel appearing for respondents Nos.1 & 3 has tendered the order passed by the Director of Enforcement under Section 41 of the FERA. A copy of this order has been sent to (1) Chimanbhai H.Kapadia (2) M/s. Swami Nana Exchange (P) Ltd., Nadiad and (3) M/s. Jayantilal Harjivandas & Co., Nadiad. Though the petitioner has substantially challenged the seizure and retention of foreign as well as Indian currencies including certain documents, he has not prayed for getting the order passed by respondent No.3 Director of Enforcement by virtue of his power under Section 41 of the FERA, set aside. The case of the petitioner is mainly based on the allegations of illegal and unauthorised seizure of the foreign currencies as well as Indian currencies mentioned in the seizure report produced by the petitioner. Relief (A) prayed by the petitioner says that the petitioner is ready to accept the stock-in-trade seized by the officers on any suitable terms and conditions.

13. The above set of facts and other relevant aspects referred hereinabove indicates that the petitioner as well as the contesting respondents Nos.1 & 3 are consistent in their stand. Consistency in the stand of the petitioner that the foreign currency of 30,000 US \$ is purchased as per the guidelines issued by the RBI and

in accordance with the provisions of the FERA and the same was handed over to the petitioner's uncle under given circumstances to keep the same in safe custody, is a plus point but it is important to note that the company itself is not the petitioner. I agree that an authorised officer of the company can file petition under Article 226 of the Constitution of India but, non-production of some of the important documents like Panchnama drawn by the ATS officers, balance sheet of the company on 14.10.1998, the date on which the currency was seized, name of the bank/banks from where Rs.24 lacs were withdrawn on that day for purchasing foreign currency, have created a cloud against the alleged transparency of the consistency pleaded by the petitioner. Section 41 of the FERA authorises officers of the Enforcement Department to retain custody of the document seized where the concerned officer has reason to believe that the said documents would be evidence of the contravention of any of the provisions of the FERA or any Rule framed thereunder. Foreign currency note is a document for the purpose of interpretation of Sections 8, 34, 36, 37 and 41 of the FERA. The Explanation to Section 33 of the FERA says that for the purposes of this Section, Section 34 and Sections 36 to 41 "document" includes Indian currency, foreign currency and books of account (emphasis supplied). To appreciate the case of the parties before this Court, a harmonious reading of substantive section and the provisions of presumption and burden under Section 71 and Section 8 (1) is important. Section 8 (1) of the FERA embraces various modes. According to the petitioner, Chimanbhai H. Kapadia - the uncle of the petitioner - had never acquired foreign currency of 30,000 US \$. The act of handing over these currency notes to his uncle Chimanbhai H. Kapadia by the petitioner cannot be said to be a transfer by any mode reflected under Section 8 (1) of the FERA. It is vehemently argued that the term "otherwise acquired" should be interpreted in the manner in which it is placed in the section. Mr.A.D.Shah, learned Counsel appearing for the petitioner, has placed his reliance on the decision of the Bombay High Court in the case of STATE OF MAHARASHTRA v. DR. MAHESH P. MEHTA. In that case the Bombay High Court considered acquisition and possession of foreign exchange by interpreting Section 8 (1) of the FERA. In that case, the Bombay High Court has observed that:

"The inevitable but most rational outcome of this analysis would be that the prosecution may be able to establish its case in respect of any of the items or modes prescribed in S.8 (1)

including even the clause "otherwise acquired", independent of the presumption under S.71 (3). Otherwise prosecution would be entitled to take recourse to the said presumption being raised by virtue of mere possession of the person having been established. In that event, if he discharges the burden successfully then the chapter is closed in his favour, and if not, then factum of physical possession, which is the basis aspect and which is responsible for raising presumption, and which is equally impliedly in existence as the foundation in items prescribed in S.8 (1), is obviously converted into his "otherwise acquiring" the foreign exchange without permission of the Reserve Bank which amounts to contravention under S.8 (1). It thus unmistakably becomes possession by acquisition. The user of the term "otherwise acquired" should be thus construed."

The facts of this cited case are totally different. Dr. Mahesh Mehta (respondent No.1 of the case before the Bombay High Court) arrived at the airport at Bombay and the trained eye of the Customs officers found out 3501 US \$ from the baggage (suitcase) and Dr. Mahesh Mehta could not explain about these notes. He was also not in possession of any permission or authorisation from the RBI to hold the currency. Thus, Dr. Mahesh Mehta was prosecuted by the Enforcement Department. Smt. Mehta, sister-in-law, who was accompanying respondent No.1 Dr. Mahesh Mehta, was also interrogated and both of them were imposed with personal penalties. Dr. Mahesh Mehta had not disputed recovery of foreign currency from his custody and had accepted the charge and though he had prayed for leniency, the learned Additional Director imposed a penalty of Rs.10,000 under Section 50 of the FERA accepting the plea of guilty. It was established that he was simply a carrier of the said article from where currency notes were found. Smt. Mehta was holding a green card and was also carrying her infant. So, the suitcase containing the currency notes was handled by or possessed by Dr. Mehta. Provisions of Section 8 (1) of the FERA was interpreted by the Bombay High Court in light of the above facts. Here before this Court, it is averred by respondents Nos.1 & 3 that the foreign currency notes of 30,000 US \$ were seized not from the premises but from outside of the alleged residential premises. It is also the case of respondents Nos.1 & 3 that on more than one occasion Chimanbhai H. Kapadia had visited the office of the Enforcement Department in response to the show cause notice issued by the

Department. I agree that the petitioner has tried to explain this allegation but the fact remains that since 1994 name of this Chimanbhai H. Kapadia is with the office of the Enforcement Directorate (FERA) of Ahmedabad. During the subsequent search conducted by the Department, some important documents were seized. There may not be any further interrogation or repeated interrogations of the petitioner, or Chimanbhai H. Kapadia, Himanshu Kapadia and Rahulbhai. But it would not be legal to jump to a conclusion that the Department intends to retain the documents for the sake of retaining it merely because the officer has authority to retain the same for a period of one year (six months + six months) as provided under Section 41 of the FERA. The case of Dr.MAHESH MEHTA (supra) does not help the case of the petitioner.

14. The case of DEVILAL GANESHLAL MEHTA v. DIRECTOR OF ENFOROCEMENT reported in 1982 Cri. L.J. 588 of Bombay High Court relied by the petitioner is referred by Mr.Justice V.S.Kotwal at the time of dealing with the case of DR. MAHESH MEHTA - 1985 Cri.L.J. 453 (supra). In that case, the authorities raided a shop-cum-residential premises which was held by "V" as a tenant. Two other persons B and D were also staying in the premises. But at the time of the raid only B was present. During the raid certain foreign currencies were discovered and seized. The Deputy Director of Enforcement held that although "V" was the tenant of the premises, D was in exclusive possession of the same. He came to the conclusion that it was D who was in possession of the foreign currencies and D had acquired foreign currencies within the meaning of Section 8 (1) of the FERA and so he was guilty of contravention of Section 8 (1) of the FERA. Here in the the present case, the petitioner is not yet held guilty. It is not the say of respondents Nos.1 & 3 that the petitioner or his company has violated Section 8 (1) of the FERA, because the investigation is going on. It is clear from the facts that the Department has started recording statement of the persons whose names are reflected in the relevant registers and copies of the certificate issued by the petitioner's company in the capacity of a full-fledged money- changer. Endeavour of the department is to establish exclusive link between Chimanbhai and 30,000 US \$.

15. The Case of Delhi High Court in the case of SMT. MOTIA RANI BHATIA v. ADDITIONAL DIRECTOR OF ENFORCEMENT, NEW DELHI reported in 1983 Cri.L.J. page 590 interprets the terms "borrowing or lending" used in Section 4 (1) of

the FERA 1947 (old Act). Section 4 of the 1947 Act is corresponding to the Act of 1973 and there is substantive change in the provision. While appreciating the principle laid down by the Delhi High Court in the case of SMT. MOTIA RANI BHATIA (supra), the entire scheme of the Act of 1973 and the subsequent amendments shall have to be looked into. Even for the sake of argument, if, the decision relied on by the petitioner, is taken as it is, the same would not help the petitioner because the case of the petitioner is very narrow that the currency of 30,000 US \$ was handed over to Chimanbhai H. Kapadia to keep it in safe custody. On a close reading of the case of the petitioner in light of the stand taken by respondents Nos.1 & 3, I am satisfied that the petitioner has tried to put some curtain on the facts of the case and the petitioner has not cared to unfold the entire truth. It is undisputed that the RBI as well as Enforcement Department (FERA) are the two main regulating authority of foreign exchange. If anything wrong is committed by violating the statutory provisions of the FERA or the Rules or the directions given by any of these authorities or notifications issued will be an actionable wrong. It would not be proper to accept the argument that the petitioner was authorised to deal with foreign exchange in his own style and manner under the wrap of RBI Licence. I agree that he was impliedly permitted to keep foreign exchange at his residence for safe custody. If the case of the petitioner is scanned it can be said that his act of handing over of foreign currency to his uncle was at his risk and anything wrong immediately after such handing over committed by Chimanbhai H. Kapadia would not make the petitioner entitled to the entire stock of currency on technical pleas before completion of investigation by the Department. Failure to produce the first panchnama drawn by the ATS officers goes against the petitioner. The petitioner has not stated on oath that despite of all reasonable efforts, he could not secure that panchnama. From where the foreign currency notes of 30,000 US \$ were found is a disputed question of fact and for that reason, it would not be justified for this court to accept the say of the petitioner that they were lying in some cupboard where he resides with his uncle Chimanbhai H. Kapadia. It may seriously prejudice the case of respondents Nos.1 & 3. In paragraph 1.2 of the petition it is stated that (i) the petitioner had purchased 30,000 US \$ on 14.10.1998 from different persons, (ii) that for that purpose, an amount of Rs.10 lakh and Rs.14 lakh came to be withdrawn from the bank on 14.10.1998, (iii) the petitioner was to go out and as there was no other person at the office of the company except Himanshubhai, the petitioner had taken

out 30,000 US \$ from the stock, (iv) the same was taken to the residence and (vi) the petitioner handed over the said currency notes of 30,000 US \$ to his uncle Chimanbhai H. Kapadia.

16. According to the petitioner, Himanshu Kapadia is also an authorised officer of the company and was authorised to do the business in the foreign currency and he also stays under a common roof i.e. with Chimanbhai H. Kapadia and the petitioner at 10 Uttam Park Society, Nadiad. It is an undisputed fact that the ATS officers visited the residence of the petitioner or say Chimanbhai H. Kapadia on 14.10.1998 in the afternoon. It is not disputed that the raids by the ATS officers were carried out on prior information. In the afternoon (as per Annexure-E at page 24) of 14.10.1998, Nadiad Police had seized daily purchase books of M/s. Swami Nana Exchange (P) Ltd. so, prima facie, it can be assumed at this stage that the ATS officers must have visited the residence of Chimanbhai H. Kapadia in the early banking hours somewhere between 11.30 a.m. to 12.30 noon. In early banking hours, from which bank and under which instrument the cash of Rs.24 lakhs (Rs.10 lakh + Rs.14 lakh) was withdrawn is not unfolded by the petitioner before this Court. It is also not specifically told to this court that after receipt of this cash, when 30,000 US \$ were purchased on that day i.e. 14.10.1998, because the petitioner was not found at the residence when the uncle of the petitioner was apprehended in the after noon of 14.10.1998. When the petitioner took out the stock of 30,000 US \$ and reached his residence and at what point of time he left the premises after handing over these currency notes to Chimanbhai H. Kapadia requesting him to put the same in safe custody, what prevented Himanshubhai in bringing these currency notes at the end of the working day, are the questions which require close scrutiny. The ATS officers or the Nadiad police have not seized the entire stock of the foreign currencies lying in the office of M/s. Swami Nana Exchange (P) Ltd. It is also note revealed from the letter at Annexure-E as to whether the ATS officers had visited the office of the company of the petitioner. If the ATS officers have not visited the office of the petitioner's company, then, it can be reasonably and prima facie, inferred and said that the visit of the ATS officers was because of or on prior information. Receiving of information from one or more informants by Police department or any other such investigating agency is usual, unless it is disproved by other evidence. It would not be proper for the Courts to hold that it was a routine or an incidental visit when the Department had no prior information of contravention

of any statute. After careful reading of paragraphs 10 to 14 of the judgment of this High Court in the case of ABDUL KADER MAHOMED JHAVERI v. UNION OF INDIA reported in 1987 (1) Gujarat Law Reporter at page 537, it can be said that till Chimanbhai H. Kapadia is exonerated from the alleged charges or the period prescribed under Section 41 of the FERA expires, the Director of Enforcement (FERA) can retain the custody of documents including currencies seized during investigation. Merely because the notes are currency notes, it would not be proper to hold that the same cannot be said to be useful documents in the investigation or in the proceedings and the same can be returned on some conditions. It may be a stock-in-trade and retention by the Department may result into a big financial loss but merely on these counts, the foreign currencies should not be returned pending investigation or inquiry as if it is a muddamal. When economic offences, sensitive or serious in nature, are allegedly committed or suspected to have been committed, anticipation of financial loss on account of seizure of the stock-in-trade should be ignored. In the changing economic scenario since 1993-94, trade in or off foreign currency and its regulation if viewed strictly by the Directorate of Enforcement (FERA) should not be taken casually. I would like to refer to the relevant part of para 14 of the judgment of this Court in the case of ABDUL KADER (supra) which reads as under:

"It is obvious that Sec.41 does not apply to those documents which are seized under Sec.38. However, that does not mean that power to retain custody of seized documents under Sec.38 as relevant or useful documents can be exercised for any indefinite period which may go even beyond what is contemplated for more drastic types of documents dealt with by Sec.41. As we have already seen above, Sec.38 nowhere contemplates the period during which custody of the seized article as relevant or useful for investigation or inquiry can be retained by the authority seizing the document. But implicit in the section is the indication of legislative intention that custody of such document would remain so long as the document would remain relevant or useful to the investigation or proceedings, meaning thereby, that the custody would become co-terminus with the conclusion of the concerned investigation or proceedings. However, the petitioner vehemently submitted that the adjudicating authority may take months and years for finishing such proceedings and in the

meantime, if the passport is permitted to be kept in the custody of the seizing authority, irreparable injury will be caused to the petitioner and he may not be able to go out of the country for indefinite period and if that happens, exercise of power under Sec.38 would become unreasonable."

According to the petitioner, the foreign currency notes and other documents including Indian currencies were seized on 14.10.1998 and 15.10.1998. The Department can retain the foreign currencies at least for a period of one year (six months + six months) in view of the provisions of Section 41 of the FERA and the interpretation of this provision. How a currency note can help investigation as a document, a question could be raised, but, when a currency note is a document within the meaning and interpretation of the provisions of the FERA, as aforesaid, this Court should be strict in interpreting the word "documents" in light of the scheme of the FERA. A new currency note or some of such new brand (fresh) currency notes are there in the seized documents, some can help the Department in interrogating the persons from whom such notes are allegedly purchased. Serial number of such notes can on some occasion give a major breakthrough to the investigating agency. It may trace or establish the link and therefore retention of currency notes will be helpful to the Department. It is not the say of the petitioner that the act of search and/or seizure were absolutely illegal. Mere allegation of illegality would not make such search or seizure illegal. There should be specific averment as to how and for what reason the act of search or seizure is illegal.

17. The case of the petitioner is clear that the documents including the foreign currencies seized by the ATS officers and the Department are the properties of the petitioner's company and if the currency notes including 30,000 US \$ are confiscated behind the back merely holding Chimanbhai H. Kapadia guilty for violating Section 8 (1) of the FERA, it may cause serious prejudice to the petitioner and/or his company. This Court can observe, to avoid multiplicity, that if the Department feels, the documents including the currency notes require confiscation, then, the petitioner and/or his company should be called and an opportunity of being heard should be given to them. Mr.B.T.Rao has rightly argued that finding of the Department is made appealable and in view of the statutory power vested with the officers of the Department under Section 41 of the FERA, the reliefs prayed by the petitioner, if granted, may cause serious

prejudice to the entire say of respondents Nos.1 & 3 and the Department.

18. If this trend taken by the parties, i.e. the petitioner and contesting respondents Nos.1 & 3, is considered as it is, it seems that the Enforcement Directorate intends to contemplate action against Chimanbhai Kapadia. The say of the petitioner is that he is a straightforward businessman dealing in the sale and purchase of FE under an authorisation granted by RBI. The entire petition gives an impression that at no point of time Swami Nana Exchange (P) Ltd. or its authorised officers, including the petitioner, had acted in violation of the prevailing law. But, the element of mens rea is not required to be pleaded or to be established. This factor is irrelevant. Recent commencement of the business by the petitioner and the company Swami Nana Exchange (P) Ltd. is also not relevant in view of the relevant regulations and the provisions of Sections 8 (1), 38 & 41 of the FERA. So, the submissions advanced around this aspect does not help the petitioner.

19. The reliefs prayed by the petitioner on the basis of some of the averments made in the petition, if considered in light of the order passed the Enforcement Directorate on 8.4.1999, it can be held that the same is ambiguous. I agree that the day on which the petition was preferred, the order by the Director of Enforcement dated 8.4.1999, tendered before this court during the course of argument and, in support of the affidavit filed by respondents Nos.1 & 3 was not passed. The petitioner's company is admittedly dealing in foreign exchange. The returns sent to the RBI of the relevant quarter may have the details of sale and purchase of foreign exchange. But it is obviously post-dated. It was easy for the petitioner to produce copy of the same before the Court but the same is not produced. On the other hand, the say of respondents Nos.1 & 3 is specific that Chimanbhai H. Kapadia was served with a show cause notice for contravention of the provisions of the FERA and on 14th and 15th October 1998, the petitioner's company was not having stock of more than 30,000 US \$ if all the relevant documents are scrutinized. The persons named by the petitioner from whom the company has allegedly purchased foreign currency are not found, all of them, genuine or living persons on the relevant date. The allegation of fake names is also made in the affidavit filed by respondents Nos.1 & 3. Even according to the petitioner, from more than one person, foreign currencies were purchased. As per the memorandum issued

by the RBI, encashment certificates are issued, or say, must have been issued. Guideline Nos. 7 and 8 issued by the RBI if referred then there is ample scope for the Department to make a detailed inquiry of the persons named by the petitioner or his company in his books of account. So, the wish to retain the documents including the foreign currencies by the Department under statutory power should not be ignored by the Court while exercising discretionary power under Article 226 of the Constitution of India. Even for the sake of argument it is accepted that the petitioner and his company had complied with the directions given by the RBI and was doing business of full-fledged money-changers under a valid licence. This would not entitle the Court to ignore the say of the Directorate of Enforcement, the other regulating machinery in FE. The stage where the petitioner has sought intervention of the court and that too under Article 226 of the Constitution of India, is an early stage. There may be an element of some harassment or inconvenience to the petitioner. But to trace out an actionable wrong of a person having white collar, close scrutiny of each aspect and repeated interrogation of person or persons is an inevitable evil.

20. Something more could have been said by this Court, but as the investigation is pending with the Department and the same may cause prejudice to either party, I have restricted myself in making some observations in the foregoing paragraphs. The totality of facts and circumstances of the case vis-a-vis the legal position takes me to the conclusion that the petition should be dismissed.

21. It is clarified that the observations made in the above paras are prima facie and should be ignored by the Department or any other authority at the time of dealing with the case of the parties on merits and the same shall not have any bearing on the merit of the case. It will be open for the petitioner to approach this court or any other competent court at appropriate stage and occasion.

22. Petition is dismissed. Rule is discharged. No costs.

(KMG Thilake)

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